

(2020) 03 J&K CK 0064

In the Jammu And Kashmir High Court

Case No : Heabus Corpus Petition No. 150 Of 2019

Mysar Majeed Malik

APPELLANT

Vs

State Of J&K And Others

RESPONDENT

Date of Decision : 18-03-2020

Acts Referred:

General Clauses Act, 1897 — Section 3, 11(1), 11(1)(a), 11(1)(b), 11(2), 21
Constitution Of India, 1950 — Article 226

Citation : (2020) 03 J&K CK 0064

Hon'ble Judges : Tashi Rabstan, J

Bench : Single Bench

Advocate : Majid Bashir, Asif Maqbool

Final Decision : Disposed Off

Judgement

Tashi Rabstan, J

1. Challenge in this petition is thrown to Order no.136/DMB/PSA/2019 dated 19.03.2019, passed by District Magistrate, Baramulla - respondent no.2 herein, placing Shri Mysar Majeed Malik son of Abdul Majeed Malik resident of Mohalla Dhoni, Seriwarpura Pattan District Baramulla (for brevity the "detenu"), has been placed under preventive detention, on the grounds set out in the petition in hand.
2. Counter affidavit has been filed by the respondents, vehemently resisting the petition.
3. Heard the learned counsel for the parties and considered the matter.
4. Though various grounds of challenge have been taken by petitioner in petition on hand, yet one ground is suffice to square of the instant case, which has been fervently urged, is that detention of detenu has been made on the same grounds, on which earlier detention order had been passed and subsequently quashed by this Court.
5. Perusal of the file reveals that in view of the involvement of the detenu in the

activities prejudicial to the security of the State, he was placed under preventive detention vide Order no.160/DMB/PSA/2018 dated 12.01.2018, which was quashed by this Court vide judgement dated 01.08.2018 passed in HCP no.28/2018. Apparently, while passing aforesaid detention order, activities of detenu indulged till 12.01.2018, had been taken note of. It is not disputed that aforesaid order of detention could not stand scrutiny of this Court and the same was quashed by this Court vide judgement dated 01.08.2018, passed in HCP no.28/2018. What prompted Detaining Authority to pass a fresh order of detention, impugned in the instant petition, is anybody's guess. Bare reading of grounds of detention divulge that detenu was placed under preventive detention vide Order no.160/DMB/ PSA/2018 dated 12.01.2018, which was quashed by this Court in HCP no.28/2018, but detenu was arrested by police station Pattan on 25.02.2019 in connection with case FIR no.21/2017 as there was likelihood that he might be admitted to bail. Interestingly, there is no mention in grounds of detention about any fresh activity of detenu that he has indulge in or continued with after quashment of his earlier detention order dated 12.01.2018. It is made clear here that when a detention order is quashed by the Court issuing a high prerogative writ, like habeas corpus or certiorari, the grounds of the said detention order should not be taken into consideration either as a whole or in part even along with fresh grounds of detention for drawing requisite subjective satisfaction to pass a fresh order because once the Court strikes down an earlier detention order by issuing rule, it nullifies the entire detention order. In the present case, order of detention does not contain any fresh facts or acts. In addition to that detaining authority has referred to earlier detention order and the judgement of this Court quashing it, presumably for the purpose of showing that detenu in spite of earlier detention order was continuing his prejudicial activities but that will not absolve detaining authority of applying its mind while issuing a fresh detention order, in that detaining authority is required to issue detention order on fresh grounds and facts and not to make use of same and identical grounds that had been mentioned and made use of in the earlier detention order to place detenu under preventive detention.

6. For the foregoing reasons and in view of settled legal position, the fresh order of detention on the self-same and identical grounds, is vitiated in the law and, therefore, could not sustain. My views are supported by a three Judge judgement of the Supreme Court rendered in the case of Ibrahim Bachu Bafan v. State of Gujarat (1985) 2 SCC 24. While noticing similar provisions of the Conservation of Foreign Exchange and provisions of Smuggling Activities Act 1974 (COFEPOSA), Supreme Court in paragraph 10 has held thus:

" ...The power conferred under clauses (a) and (b) of sub-section (1) of Section 11 is in fact extension of the power recognized under Section 21 of the General Clauses Act and while under the General Clauses Act, the power is exercisable by the authority making the order, the named authorities under clauses (a) and (b) of Section 11 (1) of the Act are also entitled to exercise the power of revocation. When the High Court exercises jurisdiction under Article 226 of the Constitution it

does not make an order of revocation. By issuing a high prerogative writ like habeas corpus or certiorari it quashes the order impugned before it and by declaring the order to be void and striking down the same it nullifies the order. The ultimate effect of cancellation of an order by revocation and quashing of the same in exercise of the high prerogative jurisdiction vested in the High Court may be the same but the manner in which the situation is obtained is patently different and while one process is covered by Section 11(1) of the Act, the other is not known to the statute and is exercised by an authority beyond the purview of sub-section (1) of Section 11 of the Act. It is, therefore, our clear opinion that in a situation where the order of detention has been quashed by the High Court, sub-section (2) of Section 11 is not applicable and the detaining authority is not entitled to make another order under Section 3 of the Act on the same grounds".

7. This judgement was subsequently followed by the Supreme Court in the case of Chhagan Bagwan Kahar v. N. L. Kalna & Ors, 1989 AIR 1234. Referring to the earlier judgement in Ghulam Nabi Zaki v. State of Jammu and Kashmir, 1970 (3) SCR 35: 1971 CriLJ (N) 24, which was rendered in the context of J&K Public Safety Act, 1978, and also taking note of the Constitution Bench judgement in the case of Hadibandhu Dass v. District Magistrate Cuttak (1969) 1 SCR 227, the Supreme Court in the case supra concluded thus:

"... It emerges from the above authoritative judicial pronouncements that even if the order of detention come to an end either by revocation or by expiry of the period of detention there must be fresh facts of passing a subsequent order. A fortiori when a detention order is quashed by the Court issuing a high prerogative writ like habeas corpus or certiorari the grounds of the said order should not be taken into consideration either as a whole or in part even along with the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the Court strikes down an earlier order by issuing rule it nullifies the entire order. In the present case, no doubt, the order of detention contains fresh facts. In addition to that the detaining authority has referred to the earlier detention order and the judgement of the High Court quashing it, presumably for the purpose of showing that the detenu in spite of earlier detention order was continuing his bootlegging activities".

8. It is, thus, seen that detaining authority, while arriving at subjective satisfaction, has not only taken into consideration future prospectus of detenu indulging in similar activities but has also taken into consideration the grounds on which earlier order of detention dated 12.01.2018, had been passed. The judgement referred to above lends support to the contention of learned counsel for petitioner that the detention order without fresh material, was not sustainable.

9. For the foregoing reasons, the petition is disposed of and detention Order no.136/DMB/PSA/2019 dated 19.03.2019, passed by District Magistrate, Pulwama, is quashed. Respondents are directed to release the detenu forthwith, provided he is not required in any other case. Disposed of.

10. Registry to return detention record to counsel for respondents.